LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 29 1964
JOHN F. DAVIS, CLERK

No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

RALPH ARLEE POORE, NEWTON TOWNSEND, EDWARD NIXON, WILLIAM JOSEPH GLASS,
Petitioners,

vs.

JAMES J. MAYER, COMMON PLEAS JUDGE OF RICHLAND COUNTY, OHIO; STATE OF OHIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

STEWART R. JAFFY,
42 East Gay Street, Columbus, Ohio.
Counsel for Petitioner.
THEODORE LUTZ,
LARRY L. INSCORE,
3 North Main Street, Mansfield, Ohio.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX

Petition for a Writ of Certiorari to the Supreme Court 1
Citations to Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional Provisions Involved 3
Statement of the Case 3
Reasons for Granting the Writ 5
Conclusion 9
Appendix A 10
Appendix B 11
Appendix C 15
Court of Appeals Memo 15
Court of Appeals Journal Entry 15
Appendix D 16

Table of Cases

Bielicki v. Superior Court, 21 Cal. Rept. 552, 371 P. 2d 288 (1962) 5, 6, 14
Britt v. Superior Court, 24 Cal. Rept. 849, 374 P. 2d 817 (1962 ..... 5, 6, 14
Broadbent v. Gibson (1943), 105 Utah, 53, 140 P. (2d), 939 14
Byars v. Superior Court of Los Angeles County (1962), 21 Cal. Rptr., 556, 371 P. (2d), 292 14
Jones v. United States, 362 U.S. 257 8
Cf. Lanza v. New York, 8 L. Ed. 2d 384 7
Mapp v. Ohio, 367 U.S. 643 (1961) 7, 8, 13
Preston v. United States, 11 L. ed. 777 (1964) 8

Priestly v. Superior Court of City and County of San Francisco (1958) 50 Cal., (2d), 812, 330 P. (2d), 39 14
Silverman v. United States, 365 U.S. 505 7
State of Ohio v. Glass, 176 Ohio St. 78 (1964), 325..1, 2, 16
State, ex rel. Nixon v. Mayer, Judge, 176 Ohio St. 78 (1964) 1, 2, 11
State, ex rel. Poore v. Mayer, Judge, 176 Ohio St. 78 (1964) 1, 2, 11
State, ex rel. Townsend v. Mayer, Judge, 176 Ohio St. 78 (1964) 1, 2, 11

Statutes Cited

United States Code, Title 28, Section 1257 (3) 2

Authorities Cited

Amer. L. Inst., MODEL PENAL CODE, PROPOSED OFFICAL DRAFT, May 4, 1962, Sections 251.2 and 251.3 8
Amer. L. Inst., MODEL PENAL CODE, TENTATIVE DRAFT NO. 4, April 25, 1955, pp. 276-291 9
THE EAVESDROPPERS, Dash, Knowlton and Schwartz, Rutgers University Press (1959) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

RALPH ARLEE POORE, NEWTON TOWNSEND, EDWARD NIXON, WILLIAM JOSEPH GLASS,
Petitioners,

vs.

JAMES J. MAYER, COMMON PLEAS JUDGE OF RICHLAND COUNTY, OHIO; STATE OF OHIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of Ohio entered in *State, ex rel. Poore v. Mayer, Judge; State, ex rel. Townsend v. Mayer, Judge; and State, ex rel. Nixon v. Mayer, Judge* on April 1, 1964 and the judgment entered in *State of Ohio v. Glass* on May 27, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the trial court, the Court of Appeals of Richland County, Ohio, in the *Poore, Townsend* and *Nixon* cases is unreported and is printed in Appendix A, *infra*, p. 10. The opinion and dissenting opinion of the Supreme Court of Ohio in the *Poore, Townsend* and *Nixon* cases is reported in 176 Ohio St. 78 (1964) and is printed in Appendix B, *infra*, p. 11.

The trial court did not render an opinion in the *Glass* case. The opinion of the Court of Appeals of Richland County, Ohio, in the *Glass* case is unreported and is printed in Appendix C, *infra*, p. 15. The opinion of the Supreme Court of Ohio in the *Glass* case is reported in 176 Ohio St. 325 (1964) and is printed in Appendix D, *infra*, p. 16.

JURISDICTION

The judgment of the Supreme Court of Ohio in the *Poore, Townsend* and *Nixon* cases was entered on April 1, 1964 and in the *Glass* case, on May 27, 1964. The statutory provision believed to confer jurisdiction to review the judgments by writ of certiorari is United States Code, Title 28, Section 1257 (3).

QUESTIONS PRESENTED

1. Do police officers, who, while concealed behind a trick window-mirror during the course of a two-month exploratory surveillance, observe and record on motion picture films the activities of persons using a public toilet facility without the knowledge of those persons, violate the constitutional rights of those persons under the Fourth Amendment as applicable to the states under the Fourteenth Amendment?

2. Does the Fourteenth Amendment preclude the use of such evidence in a state criminal proceeding?

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

As the Ohio Supreme Court stated:

> "The facts and legal questions involved in these cases are identical. Therefore, the cases have been combined for purposes of opinion and will be referred to in the singular.
>
> "The city of Mansfield maintains a public toilet for men in the public square. The city police cut an opening in a door connecting the toilet room with the furnace room. Through a 'two-way' glass in this opening the police, secretly hidden, were able to observe what was going on in the toilet room. For a period of two months, the police conducted observations and also took motion pictures of persons using the toilet room, all without the knowledge of such persons. In so doing, the police were not in pursuit of law-breakers, had no search warrants, and no one was arrested while in the toilet room. No person in particular was being sought." *States ex rel. Poore et al. v. Mayer, Judge*, 176 Ohio St. 78 (1964).

Petitioners Poore, Townsend, and Nixon were indicted for sodomy and entered pleas of not guilty. At hearings on written motions made before trial in accordance with Ohio practice to suppress evidence as having been obtained by unlawful search and seizure, it was stipulated that said petitioners were not under suspicion or investigation at the time such observations were made, and that all the evidence in the case consisted of the films taken by the police and their observations while thus hidden. The motions to suppress were overruled.

The court also overruled motions to dismiss the indictments on the ground that the court had no jurisdiction because all the evidence was obtained by unreasonable search and seizure and the case was set for hearing.

Petitioners Poore, Townsend and Nixon then filed petitions in the court of appeals seeking a writ prohibiting the trial court from hearing and determining the cause on the grounds that *all the state's evidence* was obtained in violation of petitioners' rights to be secure against unreasonable searches and seizures. Respondent Judge Mayer's demurrers to the petition for failure to state a cause of action were sustained by the court of appeals.

Upon appeal to the Supreme Court of Ohio petitioners Poore, Townsend and Nixon assigned as error the ruling on the constitutional question and briefed the question. The Supreme Court of Ohio affirmed the decision of the Court of Appeals.

Petitioner Glass also made written application prior to trial to suppress as evidence testimony of police officers concerning the secret observations, the motion picture films made by them as well as the confession derived from that evidence. This application was overruled by the trial court. Police officers testified and the motion picture films were

introduced into evidence at petitioner Glass' trial. That evidence together with a written confession obtained from petitioner Glass after his arrest and before his indictment and induced by the search constituted all the evidence of the state. Petitioner Glass was convicted and sentenced to one to twenty years in the Ohio State Reformatory. Upon appeal to the Court of Appeals of Richland County, Ohio, petitioner Glass assigned as error the ruling of the trial court on the constitutional question and briefed the question. The court of appeals affirmed the conviction. The Supreme Court of Ohio dismissed petitioner Glass' appeal on the constitutional question to that court on the ground there was "no substantial constitutional question."

REASONS FOR GRANTING THE WRIT

1. The decisions below are in conflict with the decision of the Supreme Court of California in *Bielicki v. Superior Court*, 21 Cal. Rept. 552, 371 P. 2d 288 (1962) and *Britt v. Superior Court*, 24 Cal. Rept. 849, 374 P. 2d 817 (1962).

In the *Bielicki* case the Supreme Court of California held that testimony of police officers concerning homosexual activity observed incident to an exploratory search through a pipe situated in the roof of a toilet facility located in an amusement park was not admissible because the observations were made through an illegal search. The surreptitious surveillance in the *Bielicki* case was conducted by the police at the request of the owner of the amusement park.

In the *Britt* case the Supreme Court of California considered the reasonableness of a search in which a police officer equipped with a motion picture camera obtained evidence through a vent in a public toilet room located in a department store which led to a criminal charge against the defendant. The alleged homosexual conduct took place

so as to have been observable by anyone present in the rest-room. Again in the *Britt* case the Supreme Court of California in an unanimous decision found the search unreasonable under the Constitution.

2. The question presented is of decided importance regarding the right to be secure against unreasonable searches and seizures. Spying and taking motion pictures of the general public over a prolonged period of time while they are engaged in the private and intimate conduct of using toilet facilities shocks all who are sensitive to the decencies of civilized conduct. Especially must this be so when the surreptitious surveillance is an entirely exploratory undertaking. None of the persons observed and photographed including petitioners were even suspected of criminal conduct.

This is not an isolated instance of exploratory spying by police as evidenced by the two California cases referred to above. *Bielicki v. Superior Court*, 21 Cal. Rept. 552, 371 P. 2d 288 (1962); *Britt v. Superior Court*, 374 P. 2d 817 (1962). There is something sinister about the prospect of having our use of a public toilet facility subjected to observation and recording on motion picture film at the whim of police officers hidden behind a secret mirror.

Sanction of such police conduct encompasses approval of more than secret scrutiny in public toilet facilities. Scientific achievement in recent time has yielded all sorts of devices which make possible surreptitious invasions of individual privacy. In THE EAVESDROPPERS, *Dash, Knowlton and Schwartz*, Rutgers University Press (1959) the authors describe the use of mirror-window devices, such as the one in the case at bar, by large department stores in their customers' dressing rooms to detect thefts by customers. Also described is the use of hidden microphones in

restrooms by employers to detect thieves among their employees and the use of wire taps on the telephones of their executives to determine their loyalty to the company. Listening devices which can pick up ordinary conversations from substantial distances are described. And the use by employers of lie detectors to aid in selecting employees is becoming widespread. All these devices have a certain scientific allure which tends to obscure the fact that individual privacy is being dissolved. Sanction of the police conduct in the case at bar can only lead to further excesses both by the police and private persons.

3. The decision of the court below is believed to be erroneous.

Mapp v. Ohio, 367 U.S. 643 (1961) of course, established that evidence obtained through an unreasonable search was not admissible in state court criminal proceedings. *Ker v. California*, 10 L. ed 2d 726 (1963) holds that for a search to be reasonable it must be "consistent with federal constitutional guarantees." *Silverman v. United States*, 365 U.S. 505, held that use of an electronic device to monitor conversations of persons occupying a house constitutes an unreasonable search, at least when a trespass is incident to the search.

The *Silverman* case, *supra*, requirement that a trespass must accompany the search to render it constitutionally unreasonable has not been rigidly applied by the Court. *Cf. Lanza v. New York*, 8 L. Ed. 2d 384. In the *Lanza* case which involved the reasonableness of a search conducted by prison officials employing an electronic listening device in the visiting room of the prison. The Court did not reach the constitutional issue but the majority opinion by way of dicta did not rest its decision squarely on lack of trespass. Three members of the Court in the *Lanza* case in con-

curring opinions indicated that the search in the *Lanza* case would present a serious constitutional question.

In *Jones v. United States*, 362 U.S. 257, the Court held that a person legally on the premises has standing to raise the issue of the reasonableness of a search. It is submitted that persons in the public toilet facility were legally on the premises and that the atmosphere of privacy incident to the use of a public toilet is sufficient to confer standing to raise the issue of the reasonableness of a search.

Moreover, the Fourth Amendment protects "the right of the people to be secure in their person * * *." In the case at bar the persons of petitioners and all others using the facility were searched, not a place. It is not arguable that a police officer without making a valid arrest could go through a man's pockets because he is in a public place. The police cannot conduct an exploratory search of an automobile because it is on a public street. *Preston v. United States*, 11 L. ed 777 (1964). These searches constitute "rude invasions of privacy" in the *Mapp* case, *supra*. The *Jones* case, *supra*, is believed to be authority for finding that the *Silverman* case, *supra*, requirement of a trespass did take place in the case at bar. However, petitioners contend that the invasion of privacy in the case at bar is sufficiently grave to warrant the Court to disregard the necessity of finding a technical trespass.

Another aspect of this case deserves mention. Petitioners are charged with the crime of sodomy which under Ohio law is, and has been since 1885, a felony. The American Law Institute would make such conduct a petty misdemeanor. Amer. L. Inst., *Model Penal Code, Proposed Official Draft*, May 4, 1962 Sections 251.2 and 251.3. The American Law Institute does not condone sexual deviation but recognizes that harsh criminal sanction is not the solu-

tion and documents its reasons. Amer. L. Inst., *Model Penal Code, Tentative Draft No. 4*, April 25, 1955, pp. 276-291. The concensus of opinion of the American Law Institute that a person convicted of sodomy be subjected to petty misdemeanor punishment is a persuasive argument that the conviction of persons who have commited sodomy *is an end not justified by the deplorable means employed in the cases at bar* to obtain evidence, *i.e.*, arbitrary secret observation and filming of all persons using a public toilet facility.

CONCLUSION

Based upon the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

STEWART R. JAFFY,
42 East Gay Street, Columbus 15, Ohio,
Counsel for Petitioner.
THEODORE LUTZ,
LARRY L. INSCORE,
3 North Main Street, Mansfield, Ohio.

APPENDIX A

Court of Appeals Opinion

Per Curiam:

Demurrer sustained, the Relator being afforded an adequate remedy, in the ordinary course of law.

Journal Entry to be submitted.

/s/ D. Deane McLaughlin,
Judge,

/s/ John C. Duffy,
Judge,

/s/ Leland Rutherford,
Judge.

APPENDIX B

Statement of the Case.

THE STATE, EX REL. POORE, APPELLANT, *v.* MAYER, JUDGE, APPELLEE.

THE STATE, EX REL. TOWNSEND, APPELLANT, *v.* MAYER, JUDGE, APPELLEE.

THE STATE, EX REL. NIXON, APPELLANT, *v.* MAYER, JUDGE, APPELLEE.

(Nos. 38164, 38165 and 38237—Decided April 1, 1964.)

APPEALS from the Court of Appeals for Richland County.

The facts and legal questions involved in these cases are identical. Therefore, the cases have been combined for purposes of opinion and will be referred to in the singular.

The city of Mansfield maintains a public toilet for men in the public square. The city police cut an opening in a door connecting the toilet room with the furnace room. Through a "two-way" glass in this opening the police, secretly hidden, were able to observe what was going on in the toilet room. For a period of two months, the police conducted observations and also took motion pictures of persons using the toilet room, all without the knowledge of such persons. In so doing, the police were not in pursuit of lawbreakers, had no search warrants, and no one was arrested while in the toilet room. No person in particular was being sought.

The relator herein was indicted for sodomy and entered a plea of not guilty. At a hearing on a motion to suppress evidence as having been obtained by unlawful search and seizure, it was stipulated that relator was not under suspicion or investigation at the time such observations were made, and that all the evidence in the case consists of the films taken by the police and their observations while thus

hiding. The motion to suppress the evidence was overruled.

The court also overruled a motion to dismiss the indictment on the ground that the court had no jurisdiction because all the evidence was obtained in violation of relator's constitutional rights, and the case was set for hearing.

The instant action in prohibition was instituted in the Court of Appeals, seeking a writ prohibiting the trial court from hearing and determining the cause. A demurrer to the petition was filed on the ground that the petition does not state a cause of action for which a writ of prohibition may be granted.

The demurrer was sustained and, relator not desiring to plead further, the petition was dismissed.

An appeal as of right brings the cause to this court for review.

Messrs. Lutz & Inscore, *Mr. Stewart R. Jaffy* and *Mr. Harold E. Gibson*, for appellants.

Mr. Rex Larson, prosecuting attorney, and *Mr. William F. McKee*, for appellee.

Per Curiam. There is no question that the trial court, in the criminal proceeding, had jurisdiction of the subject matter and of the person of accused. The court had the power to determine its own jurisdiction. Prohibition cannot be used to obtain an advance ruling as to the admissibility of evidence. Relator's remedy is by way of appeal from an alleged erroneous ruling on the admissibility of the evidence.

Judgments affirmed.

TAFT, C. J., ZIMMERMAN, KERNS, O'NEILL, GRIFFITH and HERBERT, JJ., concur.

KERNS, J., of the Second Appellate District, sitting by designation in the place and stead of MATTHIAS, J.

Dissenting Opinion, per GIBSON, J.

GIBSON, J., dissenting. Traditionally a writ of prohibition lies only where a court lacks jurisdiction and may not issue where a review of the proceeding by appeal is available. Certainly, prohibition can not be used to obtain an advance ruling as to the admissibility of evidence. Extraordinary remedies, however, must be adaptable to changes in the substantive law. Where the substantive law changes so that illegally obtained evidence serves to void a conviction, as has been the law since *Mapp v. Ohio* (1961), 367 U. S. 643, then prohibition should lie.

It should be noted that relators have no rights of appeal from the denials of their motions to suppress the evidence or the denials of their motions to dismiss the indictments. They will be required to stand trial and to appeal, if convicted, to obtain determinations as to whether the evidence upon which the prosecution rests is constitutionally admissible.

Had the state not stipulated that *all the evidence* on which the indictments and the prosecutions rest consists of the films taken by the police and their observations made while in hiding, it would be easier to comprehend the justice of applying the traditional rules. However, if as the relators contend, this evidence, which is all the evidence, is the result of an unlawful search and seizure there can be no lawful convictions.

Assuming, without deciding, that the relators are correct in their contentions, it seems totally unnecessary to force them to expend time and money, which they may not possess, for trials and possible subsequent appeals to the Court of Appeals and then to this court before the convictions are set aside. True, under such a process, one or more of the relators may abandon their fight for liberty because of lack of funds or because they can not bear the harassment of ex-

tended litigation. This is not the brand of justice of which Americans are so justifiably proud.

If as the relators contend the only evidence in these cases was obtained by illegal search and seizure contrary to constitutional guarantees, then prohibition would appear to be a proper remedy even though rights of appeal are available to them. Other states have held prohibition to be an appropriate remedy in circumstances very similar to the cases at hand. *Dielicki v. Superior Court of Los Angeles County* (1962), 21 Cal. Rptr., 552, 371 P. (2d), 288; *Byars v. Superior Court of Los Angeles County* (1962), 21 Cal. Rptr., 556, 371 P. (2d), 292; *Britt v. Superior Court of Santa Clara County* (1962), 24 Cal. Rptr., 849, 374 P. (2d), 817; *Priestly v. Superior Court of City and County of San Francisco* (1958), 50 Cal. (2d), 812, 330 P. (2d), 39. Also, see *Broadbent v. Gibson* (1948), 105 Utah, 53, 140 P. (2d), 939.

For the foregoing reasons it is my opinion that the relators are entitled to determinations now as to whether the only evidence upon which these prosecutions rest was obtained by an illegal search and seizure. To say that they have an adequate legal remedy by appeal is to place undue influence upon a neat package of rules without regard for the changes which have occurred in the substantive law or for the social consequences of such rules.

APPENDIX C

Court of Appeals Memo

By the Court:

We find no prejudicial error from the record. Judgment of conviction and sentence affirmed.

No written opinion.

/s/ D. Deane McLaughlin,
/s/ Leland Rutherford,
/s/ Paul D. Van Nostran,
Judges.

Court of Appeals Journal Entry

This cause came before this Court upon the assignment of errors of Defendant-Appellant, the briefs of the parties, the arguments of counsel, and the bill of exceptions; and upon consideration thereof the Court finds no prejudicial error, and finds that the judgment of conviction and sentence should be affirmed.

Wherefore, it is the order of this Court, that judgment of conviction and sentence be, and the same hereby is, affirmed.

Costs taxed at Defendant-Appellant.

Exceptions to Defendant-Appellant.

APPENDIX D

THE STATE OF OHIO, APPELLEE, *v.* GLASS, APPELLANT.

APPEAL from the Court of Appeals for Richland County.

The appeal as of right herein is dismissed for the reason that no substantial constitutional question is involved.

TAFT, C. J., ZIMMERMAN, MATTHIAS, GRIFFITH, HERBERT and GIBSON, JJ., concur.